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Supreme Court, U.S.
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No. 97-982

In the Supreme Court of the United States

OCTOBER TERM, 1997

GERALD GARNER AND JOAN GARNER, PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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15 pp

QUESTIONS PRESENTED

1. Whether the Federal Deposit Insurance Corporation (FDIC) must allege that defendants engaged in fraudulent conduct in order to obtain a preliminary injunction under 12 U.S.C. 1821(d)(18) and (19) to preserve the assets of defendants in a suit for damages arising from wrongful banking activities.

2. Whether the court of appeals erred in finding that the injunction against defendants entered by the district court was neither punitive nor overbroad.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 125 F.3d 1272. The order of the district court (Pet. App. 23a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1997. The petition for a writ of certiorari was filed on December 10, 1997. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990 (Taxpayer Recovery Act or TRA), Pub. L. No. 101-647, § 2521, 104 Stat. 4863, amended the Federal Deposit

Insurance Act (FDIA), 12 U.S.C. 1811 *et seq.*, to alter the standards by which the Federal Deposit Insurance Corporation (FDIC or Corporation) may obtain preliminary injunctive relief during the pendency of a lawsuit to recover losses resulting from the wrongdoing of former bank officers and directors. Section 1821(d)(18) of the FDIA (as added by the TRA) provides that any court of competent jurisdiction may, at the FDIC's request:

> issue an order in accordance with Rule 65 of the Federal Rules of Civil Procedure, including an order placing the assets of any person designated by the Corporation * * * under the control of the court and appointing a trustee to hold such assets.

12 U.S.C. 1821(d)(18). Section 1821(d)(19) further provides, that, in any proceeding under Section 1821(d)(18), Rule 65 of the Federal Rules of Civil Procedure "shall apply * * * without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate." 12 U.S.C. 1821(d)(19)(A). Section 1821(d)(17) of the FDIA (which was added by a separate provision of the TRA) additionally authorizes the FDIC, in certain circumstances, to avoid asset transfers and to recover assets transferred "with the intent to hinder, delay, or defraud." 12 U.S.C. 1821(d)(17).

2. a. Until 1993, when the Office of the Comptroller of the Currency closed American Commerce National Bank (ACNB) as unsafe and unsound, petitioner Gerald Garner served as Chairman of ACNB's Board of Directors and its Chief Executive Officer. Pet. App. 3a. His wife, petitioner Joan Garner, was a member of the Board of Directors as well as one

of ACNB's principal borrowers. *Ibid.* In 1996, the FDIC, as ACNB's receiver, brought suit against petitioners, along with certain other former directors and officers, to recover more than $10 million of losses sustained as a result of imprudent loans, self-dealing, and other insider abuses. *Id.* at 3a-4a. In July 1996, relying on Section 1821(d)(18) and (19), the FDIC applied to the district court for an *ex parte* temporary restraining order freezing petitioners' assets and appointing a temporary trustee, as well as for an order to show cause why a preliminary injunction should not issue.

The FDIC submitted two lengthy affidavits in support of its application. Pet. App. 4a. The affidavits, accompanied by nearly 200 exhibits, detailed extensive evidence of wrongdoing by petitioners from which they had personally benefited. The affidavits also described numerous secretive and unusual business practices, including petitioners' failure to disclose substantial assets in response to FDIC subpoenas, as well as over 50 instances of asset transfers between family members and related business entities, which demonstrated the basis for the FDIC's concern that petitioners would dissipate their assets during the pendency of the lawsuit. *Id.* at 5a-6a.

b. The district court initially declined to rule on the FDIC's application. Although satisfied that the FDIC had shown a likelihood of success on the merits of its breach of fiduciary duty and negligence claims, the court requested further briefing on the legal basis for the injunctive relief. After the FDIC supplemented its legal arguments, the district court denied the application without prejudice, finding that, although the FDIC had shown a substantial risk of asset dissipation, it could not invoke Section

1821(d)(18) and (19) in the absence of allegations of fraud or of fraudulent conveyance claims under Section 1821(d)(17). Pet. App. 6a.

3. In August 1996, the FDIC once again applied for injunctive relief, reasserting entitlement to the requested relief under Section 1821(d)(18) and (19), as well as under traditional standards for injunctive relief. In October 1996, the district court granted the FDIC's proposed temporary restraining order. After a show cause hearing, the court found that the FDIC had shown both a likelihood of success on the merits and the possibility of asset dissipation. The court explained that, despite its initial misgivings, it was convinced after further research that the plain language of Section 1821(d)(18) and (19) authorized the asset freeze. Concerned that the order be narrowly drawn, the court required the parties to negotiate the terms of the asset freeze and to submit a proposed order. Pet. App. 7a. On December 3, 1996, the court entered a Preliminary Injunction and Order Appointing a Trustee and required petitioners to turn over certain property to the trustee by December 10, 1996. *Id.* at 8a, 32a.

4. On December 6, 1996, the court of appeals denied petitioners' application for an emergency stay of the order. Rather than comply with the injunction, however, petitioners filed a bankruptcy petition under Chapter 11 of the United States Bankruptcy Code. On January 23, 1997, the district court entered an order in the bankruptcy proceeding appointing a trustee, making the asset freeze injunction subject to the automatic stay provisions of 11 U.S.C. 362(a), and modifying the Chapter 11 automatic stay to permit petitioners' appeal of the asset freeze order. Pet. App. 8a.

5. The court of appeals affirmed the asset freeze injunction and order appointing a trustee. Pet. App. 1a-21a. The court rejected petitioners' contention, based on the decision in *FDIC* v. *Floyd*, 827 F. Supp. 409 (N.D. Tex. 1993), that Section 1821(d)(18) and (19) applies only in cases in which the FDIC alleges fraud. Pet. App. 13a. The court emphasized that the text of Section 1821(d)(18) and (19) contains neither a fraud requirement nor any cross-reference to the Section 1821(d)(17) provisions authorizing the FDIC to avoid fraudulent asset transfers. *Id.* at 13a-14a. The court also noted that the legislative history does not indicate any intent to bar the use of injunctive relief in the absence of fraud. *Id.* at 15a n.1. Refusing to read a fraud limitation into Section 1821(d)(18) based solely on its proximity to Section 1821(d)(17), the court held that the FDIC may apply the injunctive relief provisions in cases in which the FDIC has not alleged fraud but instead seeks recovery of losses arising from other illegal or wrongful banking activities. *Id.* at 14a-16a.

Deferring to the district court's factual findings, the court of appeals found that the FDIC's showing of a likelihood of success on the merits and the possibility of asset dissipation satisfied Rule 65 requirements, as modified by Section 1821(d)(19). Pet. App. 16a-18a. Finally, the court of appeals concluded, after noting the district court's careful paragraph by paragraph review of the preliminary injunction provisions, as well as petitioners' participation in the order's drafting, that the injunction was neither overbroad nor in violation of petitioners' due process rights. *Id.* at 19a.

ARGUMENT

The court of appeals correctly held that the FDIC is entitled to the requested injunctive relief under the plain language of Section 1821(d)(18) and (19) of the FDIA. Contrary to petitioners' assertion, the court of appeals' determination that the statutory injunction provisions apply in the absence of allegations of fraud does not conflict with the decision of any other court of appeals. Petitioners' further claim that the injunction is overbroad and punitive is without merit, fact-bound, and does not implicate any important question of federal law. Accordingly, review by this Court is not warranted.

1. a. Petitioners argue (Pet. 11-19) that this Court should grant certiorari to resolve a conflict among the courts of appeals on the issue whether the asset freeze provisions apply in the absence of allegations of fraud. Petitioners contend (Pet. 10, 13) that the court of appeals' decision in this case conflicts with decisions of the First, Second, Fifth, and Tenth Circuits because each of those courts of appeals has applied Section 1821(d)(17)-(19) "as a package." This case, however, presents no conflict among the courts of appeals. Indeed, no other court of appeals has addressed the issue that petitioners press.

The courts of appeals decisions cited by petitioners to demonstrate a conflict never ruled on the question whether Section 1821(d)(18) permits an asset freeze injunction in the absence of fraud allegations because each of those cases involved either fraudulent transfers or fraud prosecutions. See *FDIC* v. *Elio*, 39 F.3d 1239, 1243 (1st Cir. 1994); *FDIC* v. *Faulkner*, 991 F.2d 262, 264 (5th Cir. 1993); *In re Colonial Realty Co.*, 980 F.2d 125, 127 (2d Cir. 1992); *RTC* v. *Cruce*, 972

F.2d 1195, 1197 (10th Cir. 1992).[1] Moreover, in applying the asset freeze provisions to cases of illegal activities in addition to fraud, the court of appeals did not dispute that "subsections (17)-(19) are often used as a package" because injunctive relief is an effective weapon for avoiding the fraudulent transfers contemplated by Section 1821(d)(17). Pet. App. 14a.

Because this case is the first one before any court of appeals in which the FDIC has invoked the asset freeze provisions to prevent dissipation of assets by persons charged with benefiting from wrongdoing other than fraud, its holding is not in conflict with the decision of any other court of appeals, and no further review is warranted. Further, the Ninth Circuit's rejection of the flawed reasoning of the district court in *FDIC* v. *Floyd*, 827 F. Supp. 409 (N.D. Tex. 1993), the case upon which petitioners principally rely (Pet. 12-13), creates no conflict requiring resolution by this Court.[2] Compare Sup. Ct. R. 10(a) (conflict with "other court of appeals" is a reason to grant certiorari).

b. The court of appeals correctly interpreted Section 1821(d)(18) to authorize injunctive relief without any requirement of fraud allegations. In keeping with basic principles of statutory construction, the court both began and ended its analysis with the plain

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[1] Several of the district court cases relied on by petitioners similarly involved alleged fraud. See *FDIC* v. *Hinch*, 879 F. Supp. 1099, 1101 (N.D. Okla. 1995); *NCUA Board* v. *Concord Limousine, Inc.*, 872 F. Supp. 1174, 1175 (E.D.N.Y. 1995); *RTC* v. *Spagnoli*, 811 F. Supp. 1005, 1013 (D.N. J. 1993).

[2] *Resolution Trust Corporation* v. *Gershman*, 829 F. Supp. 1095, 1103 (E.D. Mo. 1993), is distinguishable from the present case because, in that case, the RTC did not allege that the defendant benefitted in any way from the alleged wrongdoing.

language of the statute. See *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) (When a statute's language is clear, "judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished."); *Hubbard* v. *United States*, 514 U.S. 695, 703 (1995) ("In the ordinary case, absent any indication that doing so would frustrate Congress's clear intention or yield patent absurdity, [the Court's] obligation is to apply the statute as Congress wrote it.").

Section 1821(d)(18) provides, in unambiguous terms, that, at the FDIC's request, a court may issue an order placing the assets of "any person designated by the [FDIC]" under the court's control. Nothing in the language of the statute requires that fraud allegations be made or proven before an asset freeze may be ordered. The court of appeals correctly concluded that, in the absence of any cross-reference to the provisions in Section 1821(d)(17) authorizing the FDIC to void fraudulent transfers, the mere fact that paragraphs (18) and (19) follow paragraph (17) in the United States Code does not imply that the authority granted in paragraphs (18) and (19) can be exercised only in cases involving a fraudulent asset transfer. Pet. App. 14a.[3] The Ninth Circuit properly refused to rewrite the plain language of the statute to impose such a limitation.

Unable to anchor their interpretation of Section 1821(d)(18) in the text of that Section or in its proxi-

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[3] Indeed, although paragraphs (17), (18), and (19) were codified one after the other (as the newest additions to the subsection of the code cataloguing various powers of the FDIC), paragraphs (18) and (19) were enacted together by Section 2521 of the TRA, while paragraph (17) was enacted by Section 2528. See 104 Stat. 4863-4864, 4877-4878.

mity to a separate provision, petitioners base (Pet. 19-24) their restrictive reading solely on the legislative history of the Taxpayer Recovery Act. Their resort to the legislative history is unavailing, however. This Court has consistently held that there is no reason to use legislative history to construe straightforward statutory language. *United States* v. *Gonzales*, 117 S. Ct. 1032, 1035-1036 (1997); *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992). Even if the legislative history were relevant, the legislative history does not support the fraud limitation urged by petitioners.

As the court of appeals acknowledged, the legislative history indicates that fraud was the primary target of the law. Pet. App. 15a n.1. Nevertheless, "the record provides nothing to indicate that Congress contemplated barring the use of these provisions in the absence of fraud," *ibid.*, and the court of appeals properly saw no basis in the legislative history for finding ambiguity in otherwise plain statutory language. See *Brogan* v. *United States*, No. 96-1579 (Jan. 26, 1998) ("[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself.").[4]

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[4] Petitioners point (Pet. 22-23) to an amendment that never passed as evidence that Congress intended to limit the FDIC's injunctive powers under paragraphs (18) and (19) to situations involving fraud. They incorrectly contend (Pet. 23) that the interpretation of the court of appeals would "nullify the rejection of this proposed amendment." "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the

2. Petitioners also argue (Pet. 24-28) that the Court should grant certiorari because the court of appeals rejected their claim that the district court's injunction order was overbroad and punitive. That fact-bound claim does not warrant review. As in the court of appeals, petitioners here offer neither statutory nor case law in support of their argument. The court of appeals properly deferred to the district court's detailed findings concerning the asset freeze injunction, noting that they were made after the court's paragraph by paragraph review of the proposed injunction, which petitioners participated in drafting. Pet. App. 19a. Unable to find clear error in the district court's carefully considered findings, the court of appeals correctly affirmed the district court's order. The court of appeals' determination that the facts supported the district court's asset freeze order presents no issue worthy of this Court's review.

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inference that the existing legislation already incorporated the offered change." *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks omitted). In this case, in any event, the amendment cited by petitioners would have applied only to situations involving fraud, so Congress's action on the amendment one way or the other reveals little, if anything, about Congress's intent in situations that do not involve fraud.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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